No.

In the Supreme Court of California

Agua Caliente Band of Cahuilla Indians,
Petitioner and Defendant,

vs.

Sacramento County Superior Court,
Respondent.

Fair Political Practices Commission,
Real Party in Interest and Plaintiff.

PETITION FOR REVIEW

From an Order of the Court of Appeal,
Third Appellate District, No. C043716

From an Order of the
Sacramento County Superior Court, No. 02AS04545,
The Honorable Loren E. McMaster

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I

PETITION FOR REVIEW

To The Honorable Chief Justice Ronald M. George And The Honorable Associate Justices Of The California Supreme Court:

The Agua Caliente Band of Cahuilla Indians hereby petitions for review of an order of the Court of Appeal for the Third Appellate District filed on April 24, 2003.[1] The order summarily denied the Tribe's Petition for Writ of Mandate, Prohibition, or Other Appropriate Writ arising from the trial court's denial of the Tribe's motion to quash. A copy of the order is attached as Exhibit A.

This Petition raises several substantial issues dealing with the sovereign immunity of federally-recognized American Indian tribes, the corresponding suit immunity accorded those tribes, and the purported bases for limiting that immunity. This Court's intervention on these issues is needed to settle important questions of law, secure uniformity of decision, and preserve equal treatment of litigants. Cal. R. Ct. 29(a)(1).

The Tribe's claim of sovereign immunity as to this action likewise will be lost if this lawsuit proceeds in the trial court. The

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[1] Petitioner appears specially to object to the lower court's attempt to exercise jurisdiction and in furtherance of its efforts to quash service. By making this appearance, Petitioner does not intend to waive or limit its objections to the attempted assertion of personal jurisdiction.

Tribe will be subject to the costs, expense, and burdens of litigation from which it should be immune. That injury is immediate, irreparable, and cannot be rectified by a later reversal on appeal. *See Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384, 391 (2001) (intervening by writ and directing trial court to grant a tribe's motion to quash in furtherance of federally-recognized tribal immunity from suit); *see also Bowen v. Doyle*, 880 F. Supp. 99, 134 (W.D.N.Y. 1995)(claim of tribal sovereign immunity is forever lost by subjecting the defendant to the very process from which it asserts it is immune).

This Court accordingly is respectfully requested to: (1) intervene, grant review and resolve the issues presented; or (2) intervene and retransfer the matter to the Court of Appeal with directions to resolve those issues consistent with the arguments made in this Petition. Cal. R. Ct. 29.3(a), 29.3(d).

II

QUESTIONS PRESENTED FOR REVIEW

1. Can a state superior court permit the exercise of jurisdiction over a federally-recognized American Indian tribe where the tribe has not expressly and unequivocally waived its immunity from suit and Congress has not specifically authorized the filing of the lawsuit?

2. Does the Tenth Amendment, or the reasoning in cases like this Court's decision in *Boisclair v. Superior Court*, 51 Cal. 3d 1140 (1990), authorize a state superior court to unilaterally create an exception to tribal suit immunity by weighing state versus tribal interests in determining whether the suit immunity should apply?

III

REVIEW IS NECESSARY TO SETTLE IMPORTANT QUESTIONS OF LAW REGARDING THE SCOPE OF THE FEDERALLY-MANDATED LAWSUIT IMMUNITY FOR FEDERALLY-RECOGNIZED INDIAN TRIBES

Petitioner, the Agua Caliente Band of Cahuilla Indians (the "Tribe"), seeks review by this Court to settle an important question related to the rights of federally-recognized American Indian tribes: The power of a superior court to unilaterally fashion a novel and unrecognized exception to the controlling rule of tribal immunity from lawsuits by state regulatory agencies -- in this case the Plaintiff and Real Party in Interest, the California Fair Political Practices Commission ("FPPC").

The FPPC initiated this lawsuit to impose a monetary penalty for alleged violations of the reporting requirements of the California Political Reform Act ("PRA"). The Tribe filed a motion to quash predicated on its immunity from suit resulting from its sovereign status. The trial court acknowledged the uniform and long-

standing precedent from the United States Supreme Court and lower appellate courts holding that, absent specific Congressional authorization for a suit or an express and unequivocal tribal waiver, a federally-recognized tribe is immune from suit. Nevertheless, in an unprecedented departure from established and uniform law, the trial court denied the Tribe's motion and allowed the litigation to proceed. The trial court predicated this decision on its purported ability to balance the state's alleged interest in enforcing the PRA against the immunity granted the Tribe as a sovereign entity and, in its sole discretion, conclude the state's interest predominated.

The Tribe, confronting the burden and cost of litigation in which it should not properly be compelled to participate, filed a writ petition in the Third District Court of Appeal. In summarily rejecting the petition, the Court of Appeal disregarded not only established United States Supreme Court precedent compelling dismissal of the suit, but also its own precedent in *Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384 (2001), compelling the same conclusion. By declining to review the trial court's decision, the Court of Appeal has permitted the trial court to usurp the power reposed solely in the United States Congress to decide when a federally-recognized tribe can be subjected to litigation.

Indeed, not only is the decision of court below in conflict with United States Supreme Court jurisprudence, the holding in *Redding Rancheria*, and paramount Congressional authority, it is

inconsistent with the recent ruling in another pending case from the same Superior Court. Subsequent to the ruling at issue here, another department of the Sacramento Superior Court issued a decision upholding a tribe's sovereign status in *Fair Political Practices Commission* v. *Santa Rosa Community of the Santa Rosa Rancheria dba Palace Bingo and Palace Indian Gaming Center et al.* (Sacramento Superior Court No. 02AS04544) ("the Santa Rosa action").[2]

In that ruling, which dealt with precisely the same issue that is involved in the present case, the trial court *granted* a motion to quash service predicated on tribal immunity and rejected the analysis adopted by the trial court here. This inconsistency further highlights the need for this Court's immediate intervention: in the Sacramento Superior Court, a tribe is immune from suit if the case is in Department 54, but is not immune if the case is in Department 53. It is precisely this kind of capricious application of the principles underlying tribal suit immunity that the controlling legal standard, established by the United States Supreme Court and adhered to by lower courts until the decision below, is intended to avoid.

California benefits from a large tribal population which is increasingly participating in the state's civic and political affairs. The state's relationship with the tribes within its borders is significant and

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[2] A copy of the *Santa Rosa* Ruling is lodged with this Petition and is the subject of the Tribe's motion and request for judicial notice accompanying this Petition.

ongoing. Thus, the issue of tribal susceptibility to state regulatory enforcement by means of litigation is of vital importance to the tribes in conducting their affairs, and also to the state in knowing what its enforcement powers are with respect to legislation, regulatory enactments, and compacts with those tribes.

The trial court's ruling that the FPPC's lawsuit may proceed here is a blatant appropriation of the power, reserved solely to the federal government, to determine what suits may be brought against federally-recognized tribes. It undermines the sovereign immunity the tribes historically have enjoyed under a uniform and unwavering line of authorities. Further, the ruling clouds the status of tribal immunity in California and creates a manifest conflict among the courts of the state concerning a recurring issue of great importance to the tribes as well as to the state itself. Finally, if not reversed, the erroneous ruling below will strip the Tribe of its sovereign immunity and improperly subject it to the burdens and expense of litigation in derogation of settled federal law.

The decision below therefore presents a compelling case for this Court to grant review to clarify the circumstances in which tribal suit immunity must be recognized, as well as to reenforce the narrow circumstances in which it can be abrogated. In the alternative, the Court should to grant review and transfer the case back to the Court of Appeal with instructions that it address on the merits the issues raised in this Petition.

IV

FACTUAL AND PROCEDURAL BACKGROUND

The Tribe is a defendant in an action brought by the FPPC, *Fair Political Practices Commission v. Agua Caliente Band of Cahuilla Indians, et al.*, Sacramento County Superior Court case number 02AS04545 (the "Action"). (App. 1) The FPPC's complaint alleges violations of the PRA, relating to alleged failures to comply with the Act's disclosure requirements. (App. 1-20)

On November 1, 2002, the Tribe filed a motion to quash service of the summons and complaint in the Action. (App. 21) The motion asserted the Tribe's absolute immunity from suit conferred by federal law as the result of the Tribe's status as a sovereign entity. (App. 25-45) After briefing and oral argument, the trial court denied the motion and ordered the Tribe to respond to the complaint. (App. 1336-51)

In making its ruling, the trial court did correctly analyze the governing immunity rule when it specifically acknowledged that: (1) the Tribe had not waived its immunity from the FPPC's lawsuit; and (2) Congress had not specifically authorized the FPPC's lawsuit. (App. 1340-45) Consistent with controlling law that should have ended the inquiry -- the court then should have granted the motion to quash. The trial court, however, went further and devised a "state interest" exception to tribal lawsuit immunity not articulated or

recognized in any statute, regulation, or decisional authority. The court determined that because the FPPC's lawsuit is intended to enforce regulations controlling the state's political process, and because no case previously applied tribal immunity to such suits, this lawsuit could proceed. (App. 1345-46)

The court's analysis is faulty in two significant respects: first, it misperceives the breadth of tribal immunity and, second, it confuses the state's regulatory authority with its ability to judicially enforce that authority.

With respect to the first point, the decision apparently assumes that tribal immunity exists only when Congress or the courts specifically confer it. In fact, the law is to the contrary. Tribal immunity requires no implementing legislation or judicial action. It is the rule, not the exception. Rather, it is the abrogation of immunity that requires affirmative action -- either by Congressional authorization for the litigation or express and unequivocal tribal waiver.

With respect to the second point, the court's order, in effect, created an arbitrary hierarchy of state regulatory interests, which the court opined may be balanced against the Tribe's grant of immunity. (App. 1346-51) There is no authority supporting a court-imposed "balancing test" where tribal suit immunity is concerned. Moreover, to permit trial courts to arbitrarily impose such a test, thus making tribal immunity dependent on the whims of individual trial

judges, would, in effect, grant those judges authority coextensive with that of Congress in determining the breadth of tribal immunity.

This is not the law. Not only has no court applied such a balancing test when determining tribal suit immunity, but such a standard has been expressly rejected. As the United States Supreme Court has made clear on numerous occasions, only Congress — not the courts -- is empowered to create exceptions to lawsuit immunity, and Congress -- not the courts -- is the forum where such an exception first must be debated and obtained.

The trial court invoked the Tenth Amendment to the United States Constitution to support its establishment of a balancing test to determine tribal suit immunity. But resort to the Tenth Amendment is merely another way of positing the unremarkable principle that the state has the power to regulate its internal political process. Nothing in the Tenth Amendment addresses state regulatory enforcement by a lawsuit — an area where, as noted, the Tribe enjoys immunity absent specific Congressional authorization or an express and unequivocal tribal waiver. Moreover, the trial court's Tenth Amendment analysis fails to give effect to the constitutional, legislative, and judicial authority reposing plenary power over tribal affairs in the federal government.

The trial court also concluded that if the FPPC were prevented from maintaining an enforcement action against the Tribe,

the state's political process would be "subverted" to a "significant extent." (App. 1345-51) This subversion rationale derives no support in the record or in the published case law—it was apparently a construct of the trial court.[3] In any event, it cannot support the court's narrowing of tribal suit immunity. Again, appellate courts, including the United States Supreme Court, have repeatedly held that absent express Congressional authorization or an express waiver, tribal immunity prevents judicial enforcement of *all* state laws and regulations. Redress instead must be had through federal legislation or agreement with the tribe involved.

Given the legally erroneous result reached in the trial court, the Tribe petitioned the Court of Appeal for immediate relief, setting forth the arguments outlined above. But that court summarily denied the Tribe's Petition for Writ of Mandate, Prohibition, or Other Appropriate Writ on April 24, 2003. (Exhibit "A")

On that same date, the Sacramento County Superior Court, in the *Santa Rosa* case, entered an order *granting* the motion to

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[3] The court's conclusion is especially inexplicable in that the record reflects the information the FPPC seeks already is readily available to it. The Tribe has posted the information regarding campaign contributions it makes and the lobbyists it employs on its website. Additionally, as the *Santa Rosa* court noted, all lobbyists and recipients of campaign contributions are themselves required to file disclosures with the FPPC showing payments received (in the case of a lobbyist) and of contributions (in the case of campaign committees). (*See Santa Rosa* Ruling, pp. 13-14) Application of the suit immunity here accordingly does not equate with the relevant information being "unavailable."

quash of another federally recognized Indian tribe in a substantially identical PRA enforcement action initiated by the FPPC. (*See* Motion and Request for Judicial Notice, filed concurrently herewith) The trial judge in that matter properly determined the defendant tribe to be immune from the FPPC's judicial enforcement efforts, despite the "fundamental importance of the State's sovereign interest in enforcing the PRA reporting requirements to secure full disclosure of large electoral campaign contributions and preserve the integrity of its electoral processes." (*See Santa Rosa* Ruling, p. 12)

V

ARGUMENT

A. This Court Should Grant Review To Settle The Law By Declaring That Federally-Recognized Indian Tribes Have Immunity From State Court Lawsuits Unless The Immunity Has Been Expressly And Unequivocally Waived Or There Is Express Congressional Authorization To Sue

Federally recognized Indian tribes enjoy a unique status in our system of jurisprudence. That status flows from their independent sovereignty — a sovereign status that precedes that of the individual states. *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) (tribal sovereignty "substantially pre-dates our Constitution").

This independent sovereign status, in turn, subjects the tribes only to the superior sovereignty of the United States. As one federal district court aptly stated: "[t]he only entities that can determine the extent to which the immunities and protections are afforded to tribes are Congress and the applicable tribes themselves. The state legislatures have no such right." *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1141 (N.D. Okla. 2001).

Courts accordingly uniformly hold that only federal law can define or limit the scope of tribal sovereignty. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) ("The Court has consistently recognized that . . . 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States'"); *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 (9th Cir. 2002) ("Indian tribes fall under nearly exclusive federal, rather than state, control . . . Moreover, tribal sovereignty and federal plenary power over Indian affairs, taken together, sharply circumscribe the power of the states to impose citizen-like responsibilities on Indian tribes." (citations omitted)).

There also is no dispute that tribal sovereignty includes a corresponding immunity from lawsuits: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v.*

Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998); *see, e.g., Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 172 (1977)("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe"); *People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal. 3d 509, 519 (1985)("Indian tribes are immune from suit in an absence of waiver or consent.").

No matter what the context, absent a waiver or Congressional authorization, this immunity applies to all claims, including those in which a state or state agency seeks to judicially enforce its regulatory authority against a tribe. *Kiowa Tribe*, 523 U.S. at 755 & 759 (declining to "draw distinctions between governmental and commercial activities of a tribe," or to "confine immunity from suit to transactions on reservations and to government activities" for purposes of evaluating a tribe's immunity from suit); *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (recognizing consistent Congressional reiteration of immunity, and barring counterclaim by state agency to enforce tax assessment).

In *Kiowa Tribe*, 523 U.S. 751, for example, the Supreme Court confronted whether a lawsuit could be brought in state court for the recovery on a promissory note executed by the Tribe. The Court, through Justice Kennedy, held the Tribe was entitled to immunity from the suit on the note, irrespective of whether it had signed the

note on or off the reservation or whether the note related to the Tribe's commercial, as opposed to internal governmental, activities.

In reaching this result, the Court recognized that: "[t]ribal immunity is matter of federal law and not subject to diminution by the States. [Citations.]" *Id.* at 756. Equally importantly for purposes of this litigation, the Court carefully distinguished a state's power to *regulate* tribal conduct and the state's power to *judicially enforce* it:

> We have recognized that a State may have the authority to tax or regulate tribal activities occurring within the State but outside Indian country. [Citations.] To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we affirmed that while Oklahoma may tax cigarette sales by a Tribe's store to non-members, the Tribe enjoys immunity from a suit to collect unpaid state taxes. [Citations.] There is a difference between the right to demand compliance with state laws and the means available to enforce them. [Citations.] *Kiowa Tribe*, 523 U.S. at 755.

As this quotation demonstrates, *Kiowa Tribe* was not the first time the Supreme Court had drawn the distinction between a state's perceived right to regulate and a Tribe's immunity from suit. Some seven years before, in 1991, the Court opined that the right to regulate and the ability to sue were not coextensive in the context of Oklahoma's efforts to collect a sales tax. In that regard, the Court previously had held that a state had the right to require individual tribal members to endure the "minimal burden" of collecting and

remitting state sales tax on their sales of cigarettes to non-Indians on a reservation. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976). The Potawatomi Tribe subsequently refused to comply with this "minimal burden" and sued the Oklahoma Tax Commission to enjoin an assessment. The state agency counterclaimed against that Tribe for the amount of the assessment.

While acknowledging the Tribe's underlying liability for the state tax, the Court nevertheless held that the Tribe's sovereign immunity barred the state's attempt to judicially enforce the liability:

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. *Oklahoma Tax Commission*, 498 U.S. at 514.

The distinction between the state's sovereign power to regulate on the one hand, and tribal sovereign immunity from judicial enforcement of state regulatory power on the other, has been adhered to repeatedly by intermediate federal courts. For example, the Ninth Circuit, relying on tribal immunity, barred a Title VII lawsuit against the Navajo Nation relating to preferential hiring policies imposed on a third party power district doing business on reservation lands. *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150, 1159-61 (9th Cir. 2002).

While it understood the policies behind the federal statute, the court concluded those policies played no role in the determination of whether the Tribe enjoyed immunity from the lawsuit. While a substantive violation of Title VII existed, the issue of whether the Tribe could be sued turned solely on the questions of waiver or express Congressional authorization:

> Having determined that the Nation is thrice over a necessary party to the instant litigation, we next consider whether it can feasibly be joined as a party. We hold it cannot. Federally recognized Indian tribes enjoy sovereign immunity from suit, *Pit River Home*, 30 F.3d at 1100, and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress. [Citation.]
>
> In this case, the Nation has not waived its tribal sovereign immunity and Congress has not clearly abrogated tribal sovereign immunity in Title VII cases. *Id.* at 1159.

For the same reason, the Ninth Circuit barred California from suing to enforce the state's fish and game laws on a reservation in *People of the State of California v. The Quechan Tribe of Indians*, 595 F. 2d 1153, 1155-56 (9th Cir. 1979). Again, the court recognized the state's regulatory interest, but that played no role in the resolution of the immunity issue:

> While the several distinguishing features of this case may make it unique, considered either individually or together, they cannot justify a refusal, by this court, to recognize the Tribe's claim of sovereign immunity. The fact that it is the State which has

App. 4th at 387. Further, notwithstanding the scope of the state's power to regulate, the Court likewise agreed that, as a matter of controlling federal law, a Tribe is subject to suit only where Congress has authorized it or the Tribe has waived its immunity. *Id.*

And, although the FPPC in this case has attempted to distinguish between conduct occurring on or off the reservation, the *Redding Rancheria* Court rejected such a distinction. In considering whether either of these two narrow exceptions applied, the Court of Appeal gave no weight to the fact that the conduct alleged had not occurred on the reservation: "To say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit. [Citation.]" *Id.* at 388. The Court noted that any change in that result, moreover, was a matter for Congress, not the courts. *Id.* at 390; *accord Kiowa Tribe*, 523 U.S. at 660 (Court explains judicial retention of the doctrine and the superior position of Congress to "weigh and accommodate the competing policy concerns and reliance interests"); *Oklahoma Tax Commission*, 498 U.S. at 510 (While the Supreme Court continually has reiterated the tribal suit immunity doctrine, "Congress has always been at liberty to dispense with such tribal immunity or limit it").[4]

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[4] In *Kiowa*, the Supreme Court also compared the roles of the federal judiciary and Congress in recognizing and defining tribal immunity from suit to the similar roles of the judiciary and Congress in recognizing and defining the sovereign immunity of foreign nations from suit. 523 U.S. at 759. As with tribal immunity from suit, the immunity of foreign nations began as a judicial doctrine that then

(continued...)

The foregoing authorities plainly establish that the application of the Tribe's suit immunity does not invoke any sort of balancing test. Nor does it rise or fall depending on where the alleged conduct occurs or the strength of state's need or desire to regulate. Instead, absent an express and unequivocal tribal waiver or specific Congressional authorization, the Tribe's sovereignty must be respected and a state, state agency, or private party must use means *other than a lawsuit* to gain compliance with regulations or to recover for alleged commercial or personal injuries.

Yet, when faced with the need to apply this straightforward standard, the trial court ignored the result compelled by *Kiowa Tribe* and *Redding Rancheria*. (App. 1343-46) Its denial of the Tribe's motion to quash thus is an error of constitutional dimension. Indeed, compelled by the force of the same precedents that were not followed here, a different judge of the same court recently reached the opposite conclusion: "[T]he court must conclude pursuant to the decisions of the United States Supreme Court that the Tachi Tribe is immune from the instant action brought by the FPPC." (*See Santa Rosa* Ruling, p. 12)

(...continued)

came to be limited by Congress. *Id.* The Court expected Congress to play a similar role in prescribing the scope and limits of the tribal immunity from suit doctrine. *Id.*

These inconsistent outcomes are not explainable based on factual distinctions between the cases. They are explainable only because the courts took different views of controlling law. Those differing views will, moreover, force a tribe to arbitrarily appear and defend one lawsuit, but not the other. Particularly where, as here, federally-recognized tribal sovereignty is at stake, our law should not and cannot tolerate this department-by-department variance. This Court should intervene and establish the need for uniformity that the controlling law and recognized principles of sovereignty demand.

B. This Court Should Grant Review To Settle The Law By Declaring That States Have No Reserved Power Under The Tenth Amendment To Create Novel And Unprecedented Exceptions To Tribal Suit Immunity

The trial court found that if suit immunity were to extend to the judicial enforcement of state laws like the PRA, it would impermissibly conflict with the Tenth Amendment in the United States Constitution. (App. 1347) "Such federal law would intrude upon the State's exercise of its reserved power under the Tenth Amendment to regulate its electoral and legislative processes, and would interfere with the republican form of government guaranteed to the State . . . ." (App. 1347)

But the trial court's premise is fundamentally flawed given the basis for the Tribe's motion to quash. The Tribe's motion

does not invade or invalidate the state's ability to regulate its political process. The motion implicates only the much narrower question of whether the FPPC can sue the Tribe in pursuit of its claimed regulatory authority. On this limited issue, the controlling case law unambiguously provides that only express federal law or a tribal waiver can create the authorization to sue. Absent either, there is no authority reserved to the states to permit a lawsuit.

Thus, the question is not, as the trial court suggested, whether the states have the reserved power under the Tenth Amendment to regulate their political processes or whether the federal government can, consistent with the Tenth Amendment, impede their ability to impose certain political contribution reporting and disclosure requirements. The states indisputably have the power to regulate political campaigns or create contribution disclosure rules that operate within their borders. As discussed above, the mere fact that the states may have the power to enact disclosure rules for their political campaigns does not mean they can on their own, and without express Congressional approval, sue federally-recognized Tribes in to enforce such regulatory oversight.

The power of the United States over tribal affairs is *plenary and exclusive* of the states.[5] "With the adoption of the

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[5] Both the federal courts and our state courts have long followed the principle that: "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Oklahoma Tax Commission v. Sac & Fox Nation,* 508 U.S. 114, 123

(continued...)

Constitution, Indian relations became the exclusive province of federal law." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). The effect of such a delegation manifests an intent to occupy the field, leaving nothing in reserve for the states: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims *any* reservation of that power to the States . . . ." *New York v. United States*, 505 U.S. 144, 152, (1992)(emphasis added).[6]

From the inception of the Constitution, regulation of tribal sovereignty accordingly has been exclusively a matter of federal law, not a power reserved to the states. Given this federal exclusivity, the Tenth Amendment has no role to play as a source to overcome tribal suit immunity: "The states unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original

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(...continued)

(1993)(citing *Rice v. Olson*, 324 U.S. 786, 789 (1945)); *see McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 168 (1973); *Middletown Rancheria*, 60 Cal. App. 4th at 1347. Congressional actions defining the scope of tribal immunity from suit fall squarely within the plenary authority of Congress over Indian affairs. *See Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

[6] While Congress may exercise its plenary powers over Indian affairs either by express enactment or by silence, the applicability of the Tenth Amendment to Congressional silence or inaction is questionable. Tenth Amendment analysis typically involves a Congressional enactment requiring the states to enforce a federal statutory scheme or to comply with federal regulations. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992).

powers and transferred them to the federal Government." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985). As one district court further observed:

> [T]he Supreme Court has recognized Congress' plenary power "to deal with the special problems of Indians . . ." *Morton*, 417 U.S. at 551, 94 S.Ct. 2474. This power "stems from the Constitution itself." *Id.* at 552, 94 S. Ct. 2474. Indeed, the Supreme Court has held that neither the fact that an Indian tribe has been assimilated, nor the fact that there has been a lapse in federal recognition of a tribe, was sufficient to destroy the federal power to handle Indian affairs. *United States v. John*, 437 U.S. 634, 652, 98 S.Ct. 2541, 54 L.Ed.2d 489 (1978). Accordingly, the Tenth Amendment does not reserve authority over Indian affairs to the States, and plaintiffs' Tenth Amendment claim is without merit and must be dismissed. *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 153-54 (D.D.C. 2002).

The Supreme Court of South Dakota reached the same conclusion in rejecting a claim that Congress invaded the reserved powers of the states under the Tenth Amendment regarding the custody of children by enacting the Indian Child Welfare Act, 25 U.S.C. §1901, et seq.:

> The Tenth Amendment, which reserves all nondelegated powers to the states or the people, has not been violated by the 1978 Act. The plenary power of Congress to legislate with respect to Indians is a deep-seated one. Such delegation does not infringe upon the Tenth Amendment as long as the legislative power is not exercised arbitrarily . . . . *Matter of the Guardianship of D.L.L. and C.L.L.*, 291 N.W. 2d 278, 281 (South Dakota, 1980).

The states undoubtedly do have reserved powers under the Tenth Amendment concerning elections, just as they have reserved powers relating to taxation, civil rights, fishing, hunting, conservation, child welfare, workers compensation and the like. These are all important attributes of state sovereignty. But as the cited cases illustrate, no matter what the context in which a state's sovereign interest arises and no matter what the perceived strength of its regulatory authority, the scope of tribal suit immunity is undiminished and is still controlled exclusively by federal law.

The trial court's departure from this uniform precedent by fashioning a court-created "Tenth Amendment exception" is once again an error of constitutional dimension. This Court's intervention accordingly is necessary to get the law back on its proper course and ensure that the trial court's erroneous rationale does not proliferate and improperly erode tribal sovereign status.

C. This Court Should Grant Review To Settle The Law By Declaring That Neither The State's Perceived Interest In Regulating Its Political Process, Nor The Tribe's Involvement In That Process Can Justify Creation Of Novel And Unprecedented Exceptions To Tribal Suit Immunity

In finding no suit immunity, the trial court seemingly relied most heavily on what it believed was the state's strong interest in ensuring the orderly management of its electoral processes to

override tribal suit immunity. (App. 1345-51) This interest was, in turn, championed by the FPPC and its amicus, who raised the specter of large campaign contributors running roughshod over elections unless the FPPC could sue. (App. 1141-44) The FPPC also contended [App. 89-91], and the trial court agreed [App. 1346], that because Tribe's political activities allegedly took place beyond the reservation's boundaries and allegedly did not involve matters of tribal governance, those facts could be relied on to elevate the state's interest at the expense of tribal suit immunity. None of these rationales supports the denial of the motion to quash here.

1. No Weighing Of State Versus Tribal Interests Is Appropriate In Determining Whether Tribal Suit Immunity Applies

The trial court observed that issues implicating tribal sovereignty frequently invoke a balancing of various interests. (App. 1340-51) To be sure, there are federal and state cases dealing with tribal versus state relations which incorporate a balancing of relative interests. However, those decisions deal primarily with the reach of tribal sovereign authority over activities conducted on or off the reservation. In such cases, it is entirely proper to balance federal, state, and tribal interests, and to consider whether there exists a tradition of tribal regulation of the subject in question. *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (federal and tribal interests in regulation of on-reservation hunting by non-Indians

outweighed states interests in state licensing of such hunters); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) ("More difficult questions arise where, as here, a state asserts authority over the conduct of non-Indians engaging in activity on the reservation. . . . The inquiry . . . has called for a particularized inquiry into the status of the state, federal, and tribal interests at stake . . ."); *Boisclair v. Superior Court*, 51 Cal. 3d 1140, 1158 (1990) (tribes' sovereign power to act beyond the confines of the reservation "is a fortiori minimal").

But the trial court's adoption of the reasoning in cases like *Boisclair* as the legal benchmark for determining tribal suit immunity [App. 1346], is once again an error of constitutional dimension. None of these cases, including this Court's decision in *Boisclair*, directly addresses the scope of *tribal* suit immunity. To the extent that *Boisclair* has anything relevant to say about the issue here, it is supportive of the Tribe's position, not the FPPC's. This Court acknowledged in *Boisclair* that "Indian tribes enjoy broad sovereign immunity from lawsuits" and cited *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978), in support of that assertion. *Boisclair*, 51 Cal. 3d at 1157. *Santa Clara Pueblo*, in turn, upheld the Tribe's immunity from a civil rights lawsuit. More to the point, *Santa Clara Pueblo* expressly embraces the Tribe's point here that in the absence of express Congressional authorization or an unequivocal waiver, lawsuits against a Tribe are barred by sovereign immunity. *Santa Clara Pueblo*, 436 U.S. at 58-59.

The analysis is, and must be, different with respect to the independent and discrete question of whether a state may file a lawsuit against a tribe in furtherance of the State's regulatory authority. The Ninth Circuit highlighted this fundamental difference in *Dawavendewa*, 226 F.3d at 1161:

> In pressing this argument, he [Dawavendewa, the plaintiff] correctly notes . . . that "the inherent sovereign powers of an Indian Tribe do not extend to the activities of non-members of the Tribe."
>
> From this solid precipice, however, Dawavendewa plummets to the assertion that the [Navajo] Nation cannot assert tribal sovereign immunity against Dawavendewa's claims. We disagree. Indeed, with this conclusion, Dawavendewa appears to confuse the fundamental principles of tribal sovereign authority and tribal sovereign immunity. The cases Dawavendewa cites address only the extent to which a tribe may exercise jurisdiction over those who are non-members, i.e., tribal sovereign authority. These cases do not address the concept at issue here — our authority and the extent of our jurisdiction over Indian Tribes, i.e. tribal sovereign immunity.
>
> In the case at hand, the only issue before us is whether the [Navajo] Nation enjoys sovereign immunity from suit. We hold that it does, and accordingly, it cannot be joined nor can tribal officials be joined in its stead.

This distinction between the balancing test used to determine the extent or effect of tribal sovereign authority, as opposed to the legal standard applied to determine if a state may sue a Tribe in pursuit of a state's regulatory authority, is perhaps best

illustrated by *Quechan Tribe*, 595 F.2d 1153. *Quechan Tribe* involved on-reservation hunting by non-Indians. On the tribal sovereign authority issue, the court applied a balancing test, which considered various tribal, state, and federal interests. *Id.* at 1155-57. However, when it came to the propriety of a lawsuit to enforce the state's avowed interest, no balancing of interests was even considered. On the contrary, the Ninth Circuit simply stated that "[i]t is a well-established rule that Indian tribes are immune from suit," and then held that: "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court." *Id.* at 1155.

Given this fundamental distinction between the legal standard governing the state's ability to regulate and the standard governing the authority to sue, it should come as no surprise that neither the FPPC nor the trial court cited a case where such a balancing test was applied to resolve a claim regarding tribal immunity from a lawsuit brought in state court. *There is none.*

The trial court endeavored to justify its adoption of a balancing test on the basis that none of the tribal suit immunity cases involved the kind of First Amendment or fundamental state interests "in the balance" here. (App. 1350-51) But none of the controlling authorities suggest or invite a balancing of state interests for determining when tribal suit immunity applies. No matter what the

context or state regulatory interest involved, each case holds that the issue of tribal suit immunity implicates only two limited and discrete questions: (1) is there specific Congressional authorization for the lawsuit; or (2) has the Tribe expressly and unequivocally waived its immunity from suit? The trial court accordingly exceeded its jurisdiction in relying on a balancing of interests approach in denying the Tribe's motion to quash, and this Court should intervene to lay this unfounded and unprecedented "state interest balancing exception" to rest.

2. Tribal Involvement In A State's Political Process Does Not Restrict Tribal Suit Immunity

The FPPC also argued that the Tribe's motion to quash should be denied because the Tribe's involvement in the political process allegedly took place off its reservation and did not relate to tribal governance. (App. 89-91) Neither one of these factors is implicated by the controlling standard for determining whether an exception to the rule of suit immunity exists. If there were any doubt on the issue, and the Tribe submits there is not, the United States Supreme Court has expressly *rejected* the claim that the lawsuit immunity is confined only to cases regarding tribal self-government:

> In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce . . . .

> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role that Congress may wish to exercise in this important judgment. *Kiowa Tribe*, 523 U.S. at 758.

Indeed, the Third District, too, expressly rejected the notion that the immunity applies only if tribal self-government is impinged:

> Contrary to plaintiff's view, no "tribal goal" is required to conclude a tribal activity is immunized. Nor is it necessary to determine whether, absent the immunity, a Tribe's ability to self-govern would be infringed. [Citation.] *Redding Rancheria*, 88 Cal. App. 4th at 388.

Nor is the erosion of tribal suit immunity the price the Tribe should pay for participation in California's electoral process. That is just another way of saying that the area in which the state regulates has a role to play in resolving whether tribal suit immunity is applied. Although the trial court cited *Buckley v. Valeo*, 424 U.S. 1 (1976) on this point [App. 1346], *Buckley* is inapposite to the analysis controlling here. In *Buckley*, the Supreme Court weighed the interest in campaign contribution limitations against the First Amendment, and struck a balance between the two. No party in *Buckley* resisted application of the federal statute on grounds of sovereign immunity. The most that *Buckley* means for the present case is that some interests concerning political campaign spending limitations are

sufficient to outweigh First Amendment interests. That does not answer the question of whether a state agency may enforce a state statute against an unconsenting Tribe by direct suit.

This participation/waiver rationale in any event is foreclosed by the United States Supreme Court decision in *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986). In that case, the state of North Dakota required any tribe that sought to enforce its rights as a plaintiff in civil litigation in North Dakota courts to waive its immunity from suit in such courts. In striking down the North Dakota law, the Supreme Court noted the federal constitutional interest in ensuring that all citizens have access to the courts, and held that the statutory conditions imposed by North Dakota on the exercise of that right were met only at an unacceptably high price to tribal sovereignty and thus operated to effectively bar the Tribe from the courts. *Id.* at 889-93.

Similarly, here, there is no dispute that the right to contribute to the political process is protected by the First Amendment. Requiring the Tribe to surrender its sovereign immunity in order to exercise that right is equally incompatible with federal law and tribal suit immunity. If the federal statute in *Santa Clara Pueblo*, with its clear beneficial and remedial purpose, does not overcome a Tribe's sovereign immunity for the assertion of rights equivalent to those of the First Amendment, then the state statute at issue here also does not.

3. The FPPC Must Achieve Its Regulatory Goals Through Means Other Than A Lawsuit Against A Tribe

The FPPC asserts that the rejection of judicial authority to enforce the PRA renders its regulatory scheme illusory. It also has claimed it is unfair for the Tribe to avoid rules that would apply to any one else who provides financing in elections. To hold otherwise, so the FPPC's arguments go, is to sacrifice the paramount interest of California's voters in the sanctity of the state's electoral process. (*See* App. 82-87)

But these contentions are just a cosmetic repackaging of the FPPC's balancing of interests test which has no place in the immunity analysis at issue here. For example, in *Oklahoma Tax Commission*, the Supreme Court upheld a state's ability to regulate by taxing cigarette sales, but found the immunity from suit doctrine prevented the state from pursuing "the most efficient remedy," a lawsuit:

> []Under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation . . . or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores . . . . States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. . . . And if Oklahoma and the other States similarly situated find that none of these alternatives produce the revenues

> to which they are entitled, they may of course seek appropriate legislation from Congress. *Oklahoma Tax Commission*, 498 U.S. at 514 (citations omitted).

The FPPC has a similar range of options. It may, and does, collect the campaign contribution and lobbying engagement information it seeks to obtain from the Tribe under the PRA from the candidates, the lobbyists, and from the extensive information the Tribe already voluntarily and willingly provides. (App. 30) Nothing prevents the FPPC, moreover, from approaching the Tribe on a government-to-government basis to negotiate an agreement. The Tribe would approach such an overture with willingness and cooperation. (App. 1168-69, 1254-58) A tribal-state compact on the subject of gaming regulation already is in place, and the Tribe routinely reaches such accords with other governments at the federal, state, county and municipal levels.[7] Finally, the FPPC is free to seek a legislative solution from Congress, where all the relative interests can be debated and considered. (*See also* Exhibit to Motion That Court Take Judicial Notice, pp. 12-14)

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[7] The prospect of the FPPC achieving its goals by government-to-government agreement, rather than attempting to subject the Tribe to direct regulation, is not illusory. The Tribe already has entered into numerous such agreements on a government-to-government basis with many other governments at the federal, state, county, and municipal levels. Each such agreement provides benefits to the state that it could not otherwise achieve directly. (App. 1168-69, 1254-58) The record expressly shows the Tribe's willingness to discuss a similar relationship with the FPPC. (*Id.*)

What the state cannot do, however, is exactly what it seeks to do here: File an unauthorized, unconsented to lawsuit against the Tribe. No state, state agency, or private party has trumped tribal immunity without Congressional authorization or an express and unequivocal waiver, and the FPPC should not, as a matter of law, be the first to do so.

VI

CONCLUSION

This Court should grant review to address the important policy issues raised by the trial court's abrogation of tribal suit immunity, and the Court of Appeal's refusal to rectify this departure from settled principles governing application of the sovereign immunity doctrine. Review is appropriate and respectfully urged.

DATED: May 5, 2003.

Respectfully submitted,

REED SMITH CROSBY HEAFEY LLP

By _____
James C. Martin
Attorneys for Petitioner and
Defendant Agua Caliente Band
of Cahuilla Indians

Certification of Word Count Pursuant To California Rules Of Court, Rule 28.1(e)(1)

I, James C. Martin, declare and state as follows:

1. The facts set forth herein below are personally known to me, and I have first hand knowledge thereof. If called upon to do so, I could and would testify competently thereto under oath.

2. I am the appellate attorney principally responsible for the preparation of the Petitioner/Defendant's Petition for Review in this case.

3. The Petition for Review was produced on a computer, using the word processing program Microsoft Word 97.

4. According to the Word Count feature of Microsoft Word 97, the Petition for Review contains 7,714 words, including footnotes, but not including the table of contents, table of authorities, and this Certification.

5. Accordingly, the Petition for Review complies with the requirement set forth in Rule 28.1(e)(1), that a brief produced on a computer must not exceed 8,400 words, including footnotes.

I declare under penalty of perjury that the forgoing in true and correct and that this declaration is executed on May 5, 2003 at Los Angeles, California.

James C. Martin

EXHIBIT A

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

FILED

APR 24 2003

COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT
BY _____ Deputy

AGUA CALIENTE BAND OF CAHUILLA INDIANS,
Petitioner,

v.

SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent;

v.

FAIR POLITICAL PRACTICES COMMISSION,
Real Party in Interest.

C043716
Sacramento County
No. 02AS04545

BY THE COURT:

The petition for writ of mandate, prohibition or other relief is denied.

Dated: April 24, 2003

SIMS, Acting P.J.

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cc: See Mailing List

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH CROSBY HEAFEY LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On May 5, 2003, I served the following document(s) by the method indicated below:

PETITION FOR REVIEW

☒ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 5, 2003, at Los Angeles, California.

Veronica Barreto

SERVICE LIST

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